In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 944

NATIONAL PNEUMATIC COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner National Pneumatic Company was dissolved in September, 1949, and all of its assets were distributed to its stockholders, who assumed its liabilities (Fdg. 1, Pet. 7a).

In May, 1954, the Commissioner of Internal Revenue asserted a deficiency in income and excess profits taxes against the corporation for 1944 and 1945, and sent notices thereof to the corporation and its stockholder transferees (Fdg. 3, Pet. 8a). Both the corporation and its transferees filed petitions in the Tax Court to review these ~~deficiency~~ proposed assessments (Fdgs. 4, 5, Pet. 10a). At the time of such filing there was a conflict of decisions, between the Court of Claims and the Court of Appeals for the Second Circuit on a question relevant to the company's tax liability; and while the conflict remained unresolved, settlement efforts proved fruitless (Pet. 2a). After this Court resolved the con-

flict in May, 1955,[1] however, the parties reached a settlement which was reflected in stipulations filed in September, 1957, in the Tax Court, on the basis of which that court entered orders setting for each transferee a specific dollar liability "plus statutory interest thereon" (Fdg. 6–7, Pet. 10a–12a).

In January, 1958, the Commissioner demanded that the transferees pay the stipulated tax liability plus total interest of $731,500.46 (Fdgs. 8, 17, Pet. 12a, 19a). Of the total interest sought, $456,251.69 represented "deficiency" interest, running from the time the taxes were due until 30 days after the Tax Court decrees fixing the liability, and $275,248.77 represented "delinquency" interest, running from the Commissioner's demand for payment of the Tax Court decrees until the taxes were paid (Fdg. 17, Pet. 19a–24a). The taxpayers paid both principal and interest, and then filed the present case in the Court of Claims for refund of the interest (Fdg. 11, Pet. 15a; Pet. 1a).

The Court of Claims unanimously held that the interest was properly assessed. Noting that the stockholders' argument was that under New York law they were not liable for much of the interest (Pet. 3a), the court pointed out (Pet. 4a) that federal rather than State law governs the liability of transferees for interest on taxes of their transferor for which they are responsible "except when liabilities assumed exceed assets received." The court carefully analyzed the assets distributed to the stockholders and, after adjusting downward the book value of

[1] *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232; *Lewyt Corp.* v *Commissioner*, 349 U.S. 237.

certain portions thereof (Pet. 5a–6a), ruled that the "assets received exceeded liabilities assumed" (Pet. 6a); that federal law therefore governed the transferees' liability for interest; and that under federal law the interest was properly assessed (Pet. 4a–6a). The court further stated (Pet. 6a) that "there is no adequate reason for believing that the New York law would hold the transferees to lesser interest than they have been charged."

The court's holding that the transferees are liable for both "deficiency" and "delinquency" interest (see *supra,* p. 2), upon the tax liabilities of the transferor company turns upon the particular circumstances of this case and involves primarily factual questions; and its correctness presents no issue warranting review by this Court.

1. The Tax Court orders, entered upon stipulations, fixed the transferees' total liability at a stated amount representing the taxes themselves "plus statutory interest thereon." It is settled that under federal law a transferee is liable, out of the net assets that he has received, not only for the principal amount of the transferor's tax debt but also for interest thereon to the date of payment. *Voss.* v. *Wiseman,* 234 F. 2d 237, 240 (C.A. 10); *Robinette* v. *Commissioner,* 139 F. 2d 285 (C.A. 6), certiorari denied, 322 U.S. 745; *Bos Lines, Inc.* v. *Commissioner,* 354 F. 2d 830, 839–840 (C.A. 8); *Lowy* v. *Commissioner,* 35 T.C. 393; *Stein* v. *Commissioner,* 37 T.C. 945. The Court of Claims, after reducing the book value of the assets transferred, found that the transferees received net assets of approximately $792,000, which exceeded

by more than $60,000 the total interest of approximately $731,000. Thus, the transferees were properly held liable for the total interest that had accrued upon the company's tax indebtedness.

The Court of Claims correctly held (Pet. 6a) that the stipulations for payment of "statutory interest" on the tax debts for which the transferees were liable included both "deficiency" and "delinquency" interest. Section 311 of the Internal Revenue Code of 1939 (Pet. 1b) broadly subjected transferees to their transferor's "liability" * * * in respect of the tax (including interest, additional amounts, and additions to the tax provided by law)" *i.e.*, to the same liability that the transferor had. Section 292(a) of the 1939 Code (26 U.S.C. (1939 ed.) 292(a)) provided for ~~assessment~~ deficiency interest from the time the tax was due to the date on which the deficiency was assessed, and Section 294(b) of that Code (26 U.S.C. (1939 ed.) 294(b)) provided for additional interest, if the deficiency was not paid within 10 days after the Commissioner gave notice and demanded payment. Since, as the Court of Claims pointed out (Pet. 6a), "[t]hese components are both prescribed by the Federal statute, and both are recognized as parts of the tax,"[2] the court properly concluded that the "statutory interest" which the transferees agreed to pay under their stipulations included both of these elements.

2. Petitioners apparently contend (Pet. 7) that they are not liable for that part of the interest that accrued up to the time in 1955 when this Court resolved the conflict of decisions over an issue that was

[2] Citing *Lowy* v. *Commissioner*, 35 T.C. 393, 394–395, 397.

involved in the company's tax liability (see *supra*, pp. 1–2). As noted, however, the Code provided that interest ran "from the date prescribed for the payment of the tax" (Section 292(a)) and "from the date of such notice and demand until it is paid" (Section 294(b)). It made no exception for a period during which there was pending litigation involving pertinent substantive tax questions. We know of no basis upon which the transferor company could have avoided payment of interest because of interim uncertainty as to its liability for taxes that ultimately it was found to owe.[3] Since the basis for the transferees' liability is the same as that of ~~its~~ their transferor, they similarly cannot avoid payment of the interest on that ground.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The established procedure by which to stop the running of interest in these situations is for the taxpayer to pay the tax determined by the Commissioner and then sue for a refund, which includes interest from the date of payment. Cf. *Rosenman* v. *United States*, 323 U.S. 658.

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